

USAID EVALUATION HIGHLIGHT NO. 27

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Weighing in on the Scales of Justice: Strategic Approaches for Donor-Supported Rule of Law Programs

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Summary

The development of legal systems in support of the rule of law (ROL) has become a major goal in USAID's expanding portfolio of democracy programs. And, in recent years, USAID and other donors have built a rich base of knowledge about effecting legal change—one that can serve as an important resource for refining existing ROL programs and designing future ROL efforts.

In 1993, the Center for Development Information and Evaluation (CDIE) completed a six-country assessment of USAID and other donor ROL programs. CDIE studied programs in Argentina, Colombia, Honduras, and Uruguay—where USAID has been the main donor supporting ROL efforts—and in the Philippines and Sri Lanka, where the Asia and Ford Foundations have been key. This Evaluation Highlight summarizes CDIE's evaluation synthesis, which in turn distills and analyzes the findings and recommendations of the country studies.

The CDIE assessment sought to be both retrospective and prospective and had the following three principal purposes:

To assess recent donor experience in ROL

To develop criteria for initiating ROL programs

To propose a strategic framework for setting ROL priorities and for designing country programs

The strategic framework that CDIE has developed (see Figure 1) identifies four distinct ROL strategies and recommends a sequence in which they might be used to plan and undertake ROL activities. It emphasizes strengthening host country demand for ROL reform before engaging in more conventional, supply-side, institution-building activities.

The assessment results indicate that USAID (as well as other donors) should consider a range of criteria in determining whether to invest in ROL programs. In a country where preconditions are problematic, USAID will have to decide before investing whether its policy leverage and influence can elevate the importance of ROL reform in the country's political agenda. Where political will for reform is promising but

still relatively weak, USAID will need to pursue constituency- and coalition-building strategies. Especially crucial are strategies that generate support for ROL reform by stimulating public pressure through, for example, legal advocacy groups or businesses and by strengthening the freedom and professionalism of the media.

A further important management implication of the assessment findings is that even with only modest funding levels USAID can serve in a pioneering capacity, acting as an experimental, risk-taking innovator to develop approaches that then can be taken over by multilateral donors willing to make more substantial investments.

Background

USAID has a long history of activity in ROL, which can be divided into four generations of development efforts. The *first generation*, the “Law and Development Decade,” began in the early 1960s, when the Ford Foundation and USAID supported the development of law faculties in a wide array of African, Latin American, and Asian countries.

In the mid-1970s, the New Directions Mandate ushered in a *second generation* of USAID legal-development efforts that focused on alleviating poverty by meeting the basic needs of all individuals and giving the poor a larger voice in the development process. One activity carried out under the New Directions included making legal services accessible to the poor through legal aid projects.

The *third generation* of USAID investments in the legal sector began in the early to mid-1980s with the initiation of court reform in the Latin America and Caribbean region. Referred to as the “Administration of Justice Program” (AOJ), the Latin America activities have in recent years constituted a major component of USAID-sponsored democracy programs in the region.

Currently in the 1990s, the scope of USAID law programs is becoming geographically and substantively broader. With support for democracy emerging as a major Agency objective, USAID Missions worldwide are including law projects in their country democracy programs. Furthermore, the programmatic focus and content of these efforts are encompassing a wider array of objectives, strategies, and activities than did earlier efforts. For this reason USAID activities involving legal development have come to be called “Rule of Law” (ROL) programs. (Rule of Law is also the term employed in the Agency's recent strategy paper on democracy.) The use of this term implies correctly that USAID is moving into a *fourth generation* of program activities. The intent of this CDIE assessment is to move forward the process of strategic thinking on designing fourth-generation ROL programs.

Findings

The six countries selected as case studies for this assessment (Argentina, Colombia, Honduras, the Philippines, Sri Lanka, and Uruguay) demonstrate a variety of strategies for addressing ROL issues and offer lessons for guiding ROL programming. The wide range of donor-supported ROL activities can be divided into four strategies: (1) legal-system strengthening, (2) access creation, (3) structural reform, and

(4) constituency and coalition building. Some countries studied pursued one strategy, whereas others undertook multiple strategies simultaneously (but usually gave priority to one). In several cases the initial strategy proved unproductive and was replaced by a different approach. The following analysis of each of the four strategies and its impact on ROL development provides important insights into ROL program design.

Legal-Systems Strengthening

USAID and other donors have supported strategies for strengthening legal systems in all six countries studied. Such strategies generally comprised the traditional institution-building activities and focused on enhancing the capacities of host government judicial institutions to render justice more effectively and efficiently.

For the most part, these strategies were directed toward the introduction of new systems of court administration, such as improved record keeping and budget and personnel management; the design and conduct of preentry and postentry training programs for judges, court staff, and lawyers; and the acquisition of modern technology, such as computers for case tracking.

The record of achievement with regard to legal-system-strengthening strategies is mixed. In Uruguay and Colombia, for example, these strategies have contributed to important improvements in judicial performance. In Uruguay, the introduction of oral procedures to supplement and replace much of the traditional written approach to civil-case processing has led to considerable reduction in the amount of time required to move cases through the courts. In Colombia, revamped Public Order courts for handling terrorism cases have increased the conviction rate from 30 percent to around 70 percent in the first year of operation (although still unknown is the impact of court efficiency on human rights in a country that has long had an unenviable record in this area).

Progress in the other four countries studied has been more variable, however. In Honduras, USAID assisted in upgrading the skills of prosecutors and public defenders who, despite pursuing their roles more vigorously, are still constrained by inefficient judicial procedures. In Argentina, initial efforts to improve the legal system were unsuccessful at the national level, but in the provincial courts they have found a receptive audience. Court-improvement efforts in the Philippines have received Asia Foundation support but have yielded few results.

Several lessons emerge. First, legal system strengthening is not necessarily the best place to begin ROL development. In particular, this strategy is generally not effective when political will or public pressure is absent or too weak to demand and support improvements in judicial performance. In varying ways, this has been the case at the national level in Argentina, Honduras, the Philippines, and Sri Lanka.

A second lesson is that the most successful strategies for strengthening a country's legal system depend on the environment found there. In Argentina, instituting a variety of small institution-building activities at the provincial level worked well, whereas in Colombia the Public Order courts proved to be the right place

for introducing change. In Uruguay it was training in new oral procedures, while in Sri Lanka it was helping to establish the national mediation program.

A third lesson is that introducing court statistical and database systems involves more than just counting cases. Statistical exercises launched in Argentina, for instance, have produced large quantities of data in the first few years of work, but so far this mass of information has been of little use in creating an understanding of why and where bottlenecks, delays, and backlogs occur. A similar effort in Uruguay made only slightly greater progress. Getting a firm grip on the quantitative aspects of court delay is a very difficult task, particularly in justice systems characterized by isolated and independent judges. But if a judiciary is to gain control of its cases and reduce its backlog, it must first develop a way of finding out what is going on—and this takes time.

Access Creation

In several of the countries studied, donor-supported access-creation strategies have helped make legal services more available and affordable to low-income people who lack the means and knowledge for seeking resolution of disputes or redressing of grievances when their rights have been violated. These efforts have included legal aid, paralegal training, alternative dispute resolution (ADR), legal literacy campaigns, and legal-advocacy, nongovernment-organization (NGO) support.

ADR strategies are the most widespread. In five of the six countries, USAID or the Asia Foundation is supporting ADR mechanisms designed to divert cases away from the regular court system into mediation boards, neighborhood counseling centers, and binding arbitration schemes. Most of these ADR measures are new but are showing promise as a low-cost measure for providing expeditious and accessible services for settling grievances, particularly for lower income people.

In three countries—Argentina, the Philippines, and Sri Lanka—support has been provided for legal aid programs and in the latter two for legal literacy campaigns and paralegal services as well. These activities are often limited in their reach and impact if pursued as discrete efforts. Legal aid programs tend to deal with individual cases, generally depend on scarce *pro bono* lawyer services, and frequently lack the resources to pursue court litigation. Similarly, although disputants may be motivated by what they learn through legal literacy campaigns and the paralegal efforts carried out on their behalf, their acquaintance with the law would still be too rudimentary to empower them to act effectively or have access to individuals who can act for them.

Legal aid and literacy efforts become much more effective when they are developed around specific needs and issues and are linked to organizations that have the professional legal competence to engage in litigation and to provide legal representation. The assessment revealed that legal advocacy NGOs are performing this role but only in Sri Lanka and the Philippines. Such NGOs employ lawyers who seek out and engage in class-action, public-interest suits and test cases on behalf of disadvantaged groups who suffer from a common infringement of their rights. Legal advocacy NGOs can be highly effective because they target specific issues and groups; seek, through legal means, to reform structures perpetuating poverty and oppression; and empower communities to take action in defense of their rights and to break bonds of

passivity and dependency. For these reasons investments in legal advocacy NGOs have the potential for yielding high returns.

Structural Reform

Structural-reform strategies refer to the rules governing the legal system, which usually are reflected in constitutional provisions and laws. Undertaking a donor- supported structural-reform strategy can be rewarding, although it often presents a formidable challenge because it may require constitutional changes or legislative enactments. These initiatives can be time-consuming endeavors and are likely to encounter opposition from entrenched political interests. Furthermore, structural reform is only an early step in ROL development and requires follow-up effort as part of an access-creation or legal-system-strengthening strategy to implement the reform.

All of the countries studied have engaged in structural reform of one kind or another—in some cases with USAID assistance and in other cases independently. For example, four countries sought to change their judicial personnel systems in the direction of merit-based appointments and promotions. The adoption of merit systems is particularly important for raising professional standards and enhancing the independence of the judicial branch.

Several lessons emerge in reviewing the performance of structural-reform strategies. First, the effects of structural reforms are frequently diluted by the absence of pressures for accountability and enforcement. Thus although governments in two of the countries undertaking structural change were moving ahead, in the others political will to carry through such reforms was tenuous at best. The best way to shore up political will in such cases is through continuous prodding and public pressure, without which consolidation of structural reforms tends to be problematic.

Second, because structural reforms may meet with strong resistance from entrenched interests, donor investments to help create new institutions may yield greater returns than trying to reform existing ones. For example, governments in five of the six countries—with some donor assistance—are creating ADR mechanisms to bypass court systems, which are frequently unresponsive to reforms.

Constituency and Coalition Building

The assessment's major finding concerns the need for USAID and other donors to devote more attention to constituency- and coalition-building strategies. Constituency building refers to donor support for citizen, commercial, and professional groups engaged in mobilizing public pressure for legal reform and in helping oversee government performance in executing reform measures. Similarly, coalition building refers to donor efforts to help forge reformist coalitions and alliances among NGO leaders and senior government managers.

Until recently constituency- and coalition-building strategies played only a minor role in donor ROL reform efforts. In the late 1980s it was assumed that the newly emerging democracies of Argentina, Honduras, the Philippines, and Uruguay would demonstrate the political will necessary to move directly to structural

reform and legal-system strengthening. However, except for Uruguay, it soon became clear that host government commitments to legal reform were weak and uncertain. Fortunately, in two countries—Argentina and the Philippines—it was possible to move away from these stalled efforts to constituency-building strategies aimed at increasing public pressure and political support for legal reform.

The returns on investments in constituency and coalition building—and the overall importance of this strategy in ROL efforts—are well exemplified in Colombia. Colombia is the one country where USAID undertook a concerted and protracted effort to bring together reformist elites who then became leaders in bringing major changes to the judiciary.

Potentially similar results can be found in the Philippines, where in the face of weak government commitment to legal change, the Asia and Ford Foundations focused on mobilizing new constituencies to pressure for reform. Thus the Asia Foundation helped an NGO coalition representing urban poor communities to lobby vigorously and win legislative support for urban housing rights for the poor.

A number of important lessons can be drawn from the limited experience with coalition- and constituency-building strategies. First, constituencies vary considerably in their potential for being sources of support for reform. While bar associations were rarely a major source of reform, the commercial sector provided a potentially important reform constituency. Second, although NGO-based coalitions can be difficult to build, they can be a strong force for reform. The Philippines is a good illustration, having produced effective coalitions representing indigenous minorities, women, and the urban poor, among other groups.

Third, all of the case studies indicate that free and effective media are needed to implement a successful coalition- or constituency-building effort. Only when there is free flow of information can public debate be improved. And only in such an environment can people mobilize themselves to hold the legal system accountable and press for reform. Fourth, a crucial foundation for informed public debate on a justice system is sound court statistics and data on the system's inner workings. Reliable data enable the public and reformers to identify precisely the nature of judicial deficiencies and to formulate specific, well-grounded proposals for improvement. Finally, as a fifth lesson, polling can be an invaluable adjunct to an ROL program in assessing public perceptions of judicial performance and in mobilizing demand for reform.

Strategic Implications

A range of strategic implications concerning donor approaches to ROL can be drawn from the six country assessments. In particular, sequencing of strategies is very important. In the mid-1980s, many USAID ROL programs in Latin America emphasized legal-system-strengthening and structural-reform strategies—approaches that usually are associated with conventional institution-building activities. These reform measures, which are supply-side oriented in their emphasis on increasing the provision of legal services, were frequently hampered by the indifference, if not opposition, of political elites and the judicial bureaucracy.

A lack of strong and consistent political support from host governments for ROL reforms is contributing to a shift in emphasis in USAID programming from supply-side approaches to efforts featuring demand-driven strategies. Specifically, the constituency-building and access-creation strategies, which seek to generate public pressure for reform, are assuming more prominence in USAID ROL activities, as well as in the Asia Foundation programs, particularly in the Philippines and Sri Lanka.

A second policy implication points to a range of criteria that can be used to judge whether host country environments might be favorable to ROL investments. The outlook for reform improves if, beyond a minimum commitment from the host government to basic standards of human rights, there are elites and constituencies prepared to support reform, the judicial branch is relatively autonomous and free of corruption, and the media are independent and report professionally on legal issues. Where these conditions are only partially in evidence, donors will need to bolster the reform effort through policy dialogue and conditionality.

Also suggested by donor experience in the countries studied is a design methodology that can be used to tailor ROL strategies to particular country conditions. This design methodology is represented in Figure 1 as an analytical tree.

The analytical tree begins with the question—Should USAID offer ROL support? To respond, the first step is to determine whether basic conditions in the host country are favorable for initiating ROL investment. If USAID (or another donor) decides to invest, the next step is to determine whether host country political leadership is sufficiently supportive of an ROL enterprise. Where such support is hesitant or weak, a constituency- or coalition-building strategy should be pursued. But where leadership support is sufficient, the focus should move down to the next level, which poses the query, Is the legal structure adequate? If so, analysis and planning move on to issues of access to legal services. A similar line of reasoning takes the planner eventually to the base of the tree and to the end objective of the ROL effort: better justice.

The analytical tree is intended to be a tool in the process of setting program priorities. Because in the real world answers to the questions posed in Figure 1 are seldom completely a “yes” or a “no,” donors will likely pursue more than one ROL strategy at any particular moment. The framework provides a useful guide in helping donors determine which of the four strategies should dominate under what conditions and in what sequence the emphasis on strategy should change over time.

Management Implications

The assessment has several crosscutting implications for USAID management. First, in many instances USAID ROL projects did not require large expenditures. A court monitoring enterprise in the Philippines, for example, received Asia Foundation support of less than \$100,000, and the institutional reforms implemented in the Province of Buenos Aires in Argentina, which included some half dozen significant activities, was supported with about \$170,000 from USAID over several years. What such projects frequently do require, however, is *intensive USAID staff involvement* in order to facilitate the process of dialogue and change within host government institutions and constituencies.

Second, with limited funding, USAID can serve effectively in a *pioneering or trailblazing capacity* in the ROL field. It can act as an experimental, risk-taking innovator to develop approaches that can, when proven to be effective, be taken over by multilateral donors willing to make substantial investments in this sector. The Agency's experience with a series of small and experimental grants in Uruguay is leading to a significant Inter-American Development Bank investment in ROL, and in Argentina the prospect is good for the World Bank to take over many of the efforts that the USAID program has developed. In both cases, multilateral donors viewed USAID as a flexible operation capable of experimenting to find successful ROL strategies that they might then support with substantially larger funding. As USAID looks toward a time of significantly constrained resources, this trailblazing approach should appear increasingly attractive.

Third, using *intermediary organizations as ROL program managers* has proven highly effective in five of the six cases studied. In Argentina and Colombia these agencies were host country NGOs, whereas in the Philippines and Sri Lanka a U.S. NGO took on this role, and in Uruguay an international organization—the United Nations Development Programme—did so. The NGOs' precise roles varied widely; in some cases NGOs were more involved in policy, while in other cases they were primarily administrative managers. But in all instances the intermediaries played an important role in insulating the U.S. Government in the delicate area of ROL, while in several cases they were valuable in constructing ROL strategies as well.

A final management issue concerns the chance of *legal-system strengthening becoming a "price" or "transaction cost" of pursuing the more political efforts embodied in constituency- and coalition-building strategies*. USAID may well find itself constrained by U.S. Government policy—as it has been in the past (e.g., in the Central American region)—to support ROL initiatives, even when the preconditions pointed to in the analytical tree have not been met. In such circumstances, the Agency may find itself being directed to provide legal-system strengthening support in the justice sector, even when such assistance offers little chance of succeeding. Even so, it may still be possible to launch some activities involving constituency and coalition building and access creation, while at the same time absorbing the expense of the technology transfers reflected in legal-system strengthening as a kind of "transaction cost" of pursuing initiatives to improve the political environment for sustained success.

This Evaluation Highlights was prepared by Gary Hansen and Harry Blair of the Center for Development Information and Evaluation. The highlights summarizes the findings from Weighing in on the Scales of Justice: Strategic Approaches for Donor-Supported Rule of Law Programs, USAID Program and Operations Assessment Report No. 7, PN-AAX-280, which can be ordered from the DISC, 1611 North Kent Street, Suite 200, Arlington, VA 22209-2111, telephone (703) 351-4006; fax (703) 351-4039.